KIMLIN HOUSING DEVELOPMENT SDN. BHD.

v.

BANK BUMIPUTRA MALAYSIA BHD. & ORS.

SUPREME COURT, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
EDGAR JOSEPH JR FCJ
NH CHAN JCA
[CIVIL APPEAL NO: 02-100-93]
24 MAY 1997

LAND LAW: *Charge - Deed of debenture - Chargee's power to sell charged land - Whether could be enlarged to enable chargee to sell land without taking proceedings under National Land Code to obtain a judicial sale - National Land Code 1965, ss. 206, 254-266, Chapter XVI - Companies Act 1965, ss. 108, 223*

LAND LAW: *Charge - Deed of debenture - Chargee's power to sell charged land - Debenture empowering chargee to sell land without applying for judicial sale under National Land Code - Whether against public policy - Whether void - National Land Code 1965, ss. 254-266 - Companies Act 1965, ss. 108, 223*

LAND LAW: *Charge - Sale of charged land - Rights of chargor - Sections 254 to 265 National Land Code 1965 - Whether could be waived - Whether could be contracted out by chargor*

LAND LAW: *Alienated land - Dealings in - Requirement of proper instrument - Requirement did not affect the contractual operation of any transaction relating to alienated land - Section 206(3) National Land Code 1965 - Applicability of s. 206(3) - Condition precedent - Whether there should be in existence a transaction relating to alienated land which is enforceable as a contract*

LAND LAW: *Charge - Statutory charge under National Land Code 1965 - Scope of operation - Whether would entail transfer of ownership of charged property to chargee - Whether taking effect only as a security - Whether distinguishable from Common Law mortgage*

COMPANY LAW: *Winding-up - Liquidation - Rights of debenture holders - Disposal of charged property - Powers of Receivers and Managers to realise assets - Whether such power would not survive the winding-up - Whether Receivers and Managers' status as agent of company came to an end upon winding-up - Companies Act 1965, ss. 108, 223*

COMPANY LAW: *Winding-up - Liquidation - Rights of Debenture holders - Receivers and Managers - Functions and duties of - Whether to deliver up all assets in custody to Liquidator - Disposal of charged property by Receivers and Managers pursuant to Debenture - Whether required approval of Court - Companies Act 1965, ss. 4(1), 108, 223, 300(1)*

The appellant ('the Borrower Company') had charged its several pieces of lands to the first respondent ('the Bank') as security for loans granted to it by the Bank. The charges, executed pursuant to the provisions of the National Land Code 1965 ('the Code'), were registered under s. 108 of the Companies Act 1965. The statutory charges apart, the Borrower Company had also executed a deed of debenture in favour of the Bank ('the Debenture') creating thereby a fixed and a first floating charge over its movable and immovable assets. By the said Debenture, the Bank was empowered *inter alia* to appoint receivers and managers to take possession of the Borrower Company's assets, including the charged lands, and to sell the same 'at any time after the moneys secured became repayable'.

Events having occured upon which the powers to appoint receivers and managers under the Debenture became exercisable, the Bank appointed the second, third and fourth respondents as Receivers and Managers of the Borrower Company ('the Receivers and Managers'). The Receivers and Managers had intended to sell the charged lands without resorting to proceedings under the Code to obtain a judicial sale, and, as the Debenture itself did not expressly appoint them as attorneys of the Borrower Company, applied to the High Court 'for leave to sell the lands'.

The Borrower Company, in the meanwhile, went into liquidation, whereupon steps were taken by the Liquidator to oppose the application of the Receivers and Managers aforesaid. 'Leave to sell', nonetheless, was granted by the learned Judge, ruling (i) that the Receivers and Managers were entitled to do what the Debenture entitled them to do, and (ii) that the liquidation of the Borrower Company did not affect the securities held by the Receivers and Managers, and that the Bank, as a result, was at liberty to dispose of the securities despite the liquidation. It was not in dispute that in coming to his conclusions thus, heavy reliance was placed by the learned Judge on *United Malayan Banking Corporation Bhd v. Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd.*

The Liquidator appealed and argued, in essence, that, although the Receivers and Managers were agents of the Borrower Company at the time of their appointment, their agency and powers to carry on the Borrower Company's business had ceased upon the liquidation of the Borrower Company, and

consequently, they had no authority to sell the charged lands. The Bank contended that the Receivers and Managers were entitled to sell the charged lands without taking proceedings under the Code to obtain a judicial sale, as the special agreement contained in the Debenture had conferred on them a conventional power of sale exercisable independently of the provisions of the Code. This apart, the Bank also argued that the power to sell under the Debenture arose out of the contractual provisions in the Debenture itself, and as such, it fell outside the ambit of the Code by virtue of s. 206(3) thereof. The primary issues that arose were:

(i) whether by virtue of the powers conferred upon them by the Debenture, the Receivers and Managers were entitled to sell the charged lands without taking proceedings under the Code to obtain a judicial sale.

(ii) whether the liquidation of the Borrower Company had the impact of preventing the Receivers and Managers from making a valid disposition of the charged lands, bearing in mind, particularly, the scope and operation of s. 223 of the Companies Act 1965.

Held:

Per Edgar Joseph Jr FCJ

[1] The prayer in the application by the Receivers and Managers 'for leave to sell the lands' was not appropriate. Since the Receivers and Managers had entertained some doubt about the authority under the Debenture to sell the lands, the appropriate prayer for them would be for a declaration as to entitlement to sell the lands without resorting to proceedings under the Code to obtain a judicial sale, and to give valid and registrable title to the purchaser.

[1a] The point about the form of prayer, however, was never taken by the parties either here or in the Court below, and the appeal was argued on the basis that the prayer was appropriate. That being so, the appeal stands to be decided on the same basis.

[2] The powers conferred upon the Receivers and Managers by the Debenture herein did not entitle them to sell the charged lands without taking proceedings under the Code to obtain a judicial sale.

[3] In proceedings under the Code to enforce a statutory charge over land, ss. 254 to 265 thereof confer upon the chargor certain valuable rights not available to a borrower company under a debenture in common form.

These include (i) the right to be served with Form 16 D or Form 16 E as the case may be, and the advantages that flow from that (ii) the right to prove 'cause to the contrary' (iii) the rights accorded by ss. 257, 258 and 259 respecting sale by public auction (iv) the right under s. 266(1) to stop an auction sale by tendering the sum due before the fall of the hammer. The chargor's right under this section is significant in that, if the chargor can be entitled to a discharge at such a late stage, there is no reason why he cannot be entitled to exercise the right of dicharge much earlier by selling the charged land by private treaty (v) the right to be heard when the purchaser at the judicial sale has asked for an extension to pay the balance purchase price. Denial of such right, be it noted, would render any registration of the sale null and void, and (vi) the right to set aside a judicial sale that was fraudulently, collusively or improperly conducted.

[3a] The provisions of ss. 254 to 265 of the Code are designed to protect the chargor and they cannot be waived or contracted out by him. These provisions, as well as those other provisions in Part XVI of the Code setting out the rights and remedies of parties under a statutory charge over land, are **exhaustive and exclusive**, and any attempt at contracting out of those rights, unless expressly provided for in the Code, would be void as being contrary to public policy.

[3b] It follows that no power of sale can be conferred by a chargor under the Code on a chargee himself by way of a debenture or power of attorney or otherwise, and that proceedings must be brought by the chargee to obtain a judicial sale in accordance with the rigid procedure as laid down in the Code. Consequently, any power of sale which purports to be conferred on a chargee himself by way of a debenture or power of attorney, but omitting all mention of notice, periods of default or the necessity of obtaining a judicial sale, would be invalid, and ineffective to entitle a purchaser to be registered as owner.

[3c] Bearing in mind the aforesaid, it must further follow that the case of *United Malayan Banking Corporation Bhd v. Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd,* in so far as it decides to the contrary, was wrongly decided.

[4] The cases of *Malaysia Credit Finance Bhd. v. Yap Hock Choon & Anor.* and *Chung Khiaw Bank Ltd. v. Lau Ah Yen & Anor.* were not authorities for the proposition that a chargor and chargee could by agreement enlarge the powers of a chargee under the Code so as to enable a chargee to sell the charged lands without taking proceedings under the Code to obtain a judicial sale.

[5] Section 206(3) of the Code does not apply to the facts herein. It is a condition precedent for the application of this section that there should be in existence a transaction relating to alienated land or an interest therein which is valid and enforceable as a contract. When, as here, the relevant provisions of the Debenture relied upon by the Bank as conferring upon it a power to sell the lands are void, for the reasons stated, the condition precedent for the application of the section is absent.

[6] It is not every transaction in alienated land entered into by persons or bodies referred to in s. 43 of the Code which confers rights *in rem* but only such dealings as come within the meaning and ambit of s. 5 of the Code. It follows that s. 108 of the Companies Act 1965 is not an independent source for the creation of an interest in land. Sale by debenture of land charged under the Code is nowhere provided by the statute. Section 108, thus, was enacted apparently without regard to the difference between the English law of mortgages and the statutory charge under the Code.

[7] It is the law in the United Kingdom that winding-up after a receiver and manager is appointed terminates his purely personal powers but not his *in rem* powers. The distinction between a receiver and manager's *in rem* powers and his personal powers is that the former flow from the security created by the debenture and relate to the assets of the company whereas the latter relate to everything else.

[7a] Hence, in the United Kingdom, the power given to the receiver for the purpose of securing a benefit to the debenture holder is irrevocable as power given to the debenture holders themselves. Accordingly, a receiver appointed over assets which included a mortgage debt may validly exercise the power of sale in the name of the company despite its liquidation, the rational being that it was a sale of property which did **not** belong to the company but formed part of the debenture holder's security, and therefore did not contravene s. 227 of the Companies Act 1948 (equivalent to s. 223 of our Companies Act 1965).

[8] There is an essential difference between a Common Law mortgage and a statutory charge under the Code. Under the former there is a transfer of ownership of the mortgaged land to the mortgagee, whereas under the latter there is no such transfer with the charge taking effect as a security only, enforceable by proceedings in Court to obtain a judicial sale.

[8a] It follows that in the present case, with the advent of liquidation, any sale by the Receivers and Managers of the lands pursuant to the Debenture would be a purported sale of property which belonged to the

Borrower Company, and so, would require the approval of the Court under s. 223 of the Companies Act 1965. Unlike in the United Kingdom, the receiver's general powers of realisation of assets in this country donot survive the winding-up.

[9] A receiver and manager of any part of the undertakings of the corporation appointed under a power contained in any instrument is, by virtue of s. 4(1)(b) of the Companies Act 1965, an officer of the corporation. He is therefore duty bound under s. 300(1) of the Act to deliver up to the liquidator appointed by the Court, *inter alia*, all the movable and immovable property of the corporation that came into his custody or control. The clear implication is that liquidation does not merely terminate the agency of a receiver and manager but also his powers on winding-up, since there is no estate for the receiver and manager to administer.

[Appeal allowed. Judgment of Court below set aside and substituted with declaratory orders in favour of borrower company.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG TANAH: *Gadaian - Suratikatan Debentur - Kuasa pemegang gadaian untuk menjual tanah yang digadaikan - Samada boleh diperluas bagi membolehkan pemegang gadaian menjual tanah tanpa memulakan prosiding di bawah Kanun Tanah Negara untuk mendapatkan suatu penjualan kehakiman - Kanun Tanah Negara 1965 ss. 206, 254-266, Bab XVI - Akta Syarikat 1965 ss. 108, 223*

UNDANG-UNDANG TANAH: *Gadaian - Suratikatan Debentur - Kuasa pemegang gadaian untuk menjual tanah yang digadaikan - Debentur memberi kuasa kepada pemegang gadaian untuk menjual tanah tanpa memohon untuk mendapatkan penjualan kehakiman di bawah Kanun Tanah Negara - Samada bertentangan dengan kepentingan awam - Samada tak sah - Kanun Tanah Negara 1965 ss. 254-266 - Akta Syarikat 1965 ss. 108, 223*

UNDANG-UNDANG TANAH: *Gadaian - Penjualan tanah yang telah digadaikan - Hak penggadai - Sekseyen 254 hingga 265 Kanun Tanah Negara 1965 - Samada boleh diketepikan - Samada boleh disingkir oleh penggadai melalui kontrak*

UNDANG-UNDANG TANAH: *Urusan-urusan dalam tanah yang telah diberimilik - Keperluan suratcara yang wajar - Keperluan tidak menjejaskan operasi kontraktual mana-mana transaksi berhubung dengan tanah yang telah diberimilik - Seksyen 206(3) Kanun Tanah Negara 1965*

- Pemakaian s. 206(3) - Syarat duluan - Samada seharusnya wujud satu transaksi berhubung dengan tanah yang telah diberimilik yang mana boleh dikuatkuasakan sebagai satu kontrak

UNDANG-UNDANG TANAH: *Gadaian - Gadaian berkanun di bawah Kanun Tanah Negara 1965 - Bidang operasi - Samada akan melibatkan pemindahan pemilikan hartanah yang telah digadaikan kepada pemegang gadaian - Samada berkuatkuasa hanya sebagai satu jaminan - Samada diperbezakan daripada gadai-janji Common Law*

UNDANG-UNDANG SYARIKAT: *Penggulungan - Penyelesaian - Hak pemegang debentur - Pelupusan hartanah yang telah digadaikan - Kuasa-kuasa Penerima dan Pengurus untuk melangsaikan aset-aset - Samada kuasa-kuasa sedemikian tidak dapat bertahan daripada penggulungan - Samada kedudukan Penerima dan Pengurus sebagai ejen syarikat menjadi tamat setelah penggulungan - Akta Syarikat 1965 ss. 108, 223*

UNDANG-UNDANG SYARIKAT: *Penggulungan - Penyelesaian - Hak pemegang debentur - Penerima dan Pengurus - Fungsi dan tugas-tugas - Samada harus menyerahkan kesemua aset-aset kepada Penyelesai - Pelupusan oleh Penerima dan Pengurus akan hartanah yang telah digadaikan selaras dengan Debentur - Samada memerlukan kelulusan Mahkamah - Akta Syarikat 1965 ss. 108, 223, 300(1)*

Perayu ('Syarikat Peminjam') telah menggadaikan beberapa bidang tanahnya kepada responden pertama ('Bank') sebagai jaminan bagi pinjaman yang telah diberikan kepadanya oleh Bank. Gadaian-gadaian tersebut yang telah disempurnakan selaras dengan peruntukan-peruntukan Kanun Tanah Negara 1965 ('Kanun'), telah didaftarkan di bawah s. 108 Akta Syarikat 1965. Selain daripada gadaian berkanun ini, Syarikat Peminjam telah juga menyempurnakan satu suratikatan debentur untuk manafaat Bank ('Debentur') yang dengan itu telah mewujudkan satu gadaian tetap dan gadaian terapung yang pertama ke atas aset-asetnya yang boleh alih dan tak boleh alih. Dengan Debentur itu, Bank diberi kuasa, antara lainnya, untuk melantik penerima dan pengurus-pengurus untuk mengambil milikan aset-aset Syarikat Peminjam, termasuk tanah-tanah yang telah digadaikan, dan untuk menjualnya "pada bila-bila masa selepas wang yang dijamin itu menjadi kena dibayar balik."

Setelah berlakunya peristiwa-peristiwa di mana kuasa-kuasa untuk melantik penerima-penerima dan pengurus-pengurus di bawah Debentur menjadi boleh dilaksanakan, maka Bank telah melantik responden kedua, ketiga dan keempat sebagai Penerima-penerima dan Pengurus-pengurus Syarikat Peminjam ('Penerima dan Pengurus'). Penerima dan Pengurus berhasrat untuk menjual

tanah yang telah digadaikan itu tanpa menggunakan prosiding di bawah Kanun untuk mendapatkan penjualan kehakiman, dan, oleh kerana Debentur itu sendiri tidak secara nyata melantik mereka sebagai wakil Syarikat Peminjam, mereka telah memohon kepada Mahkamah Tinggi "bagi mendapatkan kebenaran untuk menjual tanah-tanah itu."

Syarikat Peminjam, sementara itu, telah berada dalam penyelesaian, berikutan mana langkah-langkah telah diambil oleh Penyelesai untuk membantah permohonan Penerima dan Pengurus di atas. Namun begitu, "kebenaran untuk menjual" telah diberikan oleh Hakim yang bijaksana, yang telah memutuskan (i) bahawa Penerima dan Pengurus berhak untuk melakukan apa yang menurut Debentur mereka berhak melakukan, dan (ii) bahawa penyelesaian Syarikat Peminjam tidak menjejaskan jaminan-jaminan yang dipegang oleh Penerima dan Pengurus, dan dengan itu, Bank adalah bebas untuk melupuskan jaminan-jaminan itu meskipun terdapat penyelesaian tersebut. Adalah tidak dipertikaikan bahawa dalam mencapai keputusannya yang sedemikian, Hakim yang bijaksana telah banyak bergantung kepada keputusan dalam *United Malayan Banking Corporation Bhd v. Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd.*

Penyelesai telah merayu dan berhujah, secara pentingnya, bahawa walaupun Penerima dan Pengurus merupakan ejen Syarikat Peminjam ketika perlantikan mereka, ejensi serta kuasa mereka untuk mengendalikan perniagaan Syarikat Peminjam telah pun luput setelah Syarikat Peminjam berada dalam penyelesaian, dan akibatnya, mereka tidak mempunyai kuasa untuk menjual tanah-tanah yang telah digadaikan itu. Bank menegaskan bahawa Penerima dan Pengurus berhak untuk menjual tanah-tanah yang telah digadaikan itu tanpa memulakan prosiding di bawah Kanun bagi mendapatkan penjualan kehakiman, kerana perjanjian khas yang terkandung di dalam Debentur telah memberikan mereka suatu kuasa penjualan konvensional yang boleh dilaksanakan secara bebas daripada peruntukan-peruntukan Kanun. Selain itu, Bank juga berhujah bahawa kuasa untuk menjual di bawah Debentur berbangkit daripada peruntukan-peruntukan kontraktual dalam Debentur itu sendiri, dan oleh yang demikian, ianya terkeluar daripada lingkungan Kanun menurut s. 206(3). Isu-isu utama yang telah berbangkit adalah:

(i) samada menurut kuasa-kuasa yang dianugerahkan ke atas mereka oleh Debentur itu, Penerima dan Pengurus berhak untuk menjual tanah-tanah yang telah digadaikan itu tanpa memulakan prosiding di bawah Kanun untuk mendapatkan satu penjualan kehakiman.

(ii) samada penyelesaian Syarikat Peminjam mempunyai kesan menghalang Penerima dan Pengurus daripada membuat satu pelupusan sah akan tanah-tanah yang telah digadaikan itu, mengambilkira secara khususnya, skop dan operasi s. 223 Akta Syarikat 1965.

Diputuskan:
Oleh Edgar Joseph Jr HMP

[1] Pohonan dalam permohonan oleh Penerima dan Pengurus "untuk kebenaran menjual tanah-tanah tersebut" adalah tidak wajar. Oleh kerana Penerima dan Pengurus telah meragui kuasa yang diberikan oleh Debentur untuk menjual tanah-tanah tersebut, pohonan yang wajar bagi mereka adalah untuk mendapatkan satu pengisytiharan berhubung dengan hak untuk menjual tanah-tanah tanpa menggunakan prosiding di bawah Kanun untuk mendapatkan penjualan kehakiman, dan untuk memberikan hakmilik yang sah dan boleh didaftarkan kepada pembeli.

[1a] Perkara berhubung dengan bentuk pohonan, walaubagaimanapun, tidak pernah dibangkitkan oleh pihak-pihak tersebut samada di sini atau dalam Mahkamah di bawah, dan rayuan ini telah dihujahkan berdasarkan bahawa pohonan tersebut adalah wajar. Rayuan di sini, oleh itu, harus kekal diputuskan atas dasar yang sama.

[2] Kuasa-kuasa yang dianugerahkan ke atas Penerima dan Pengurus oleh Debentur di sini tidak memberikan mereka hak untuk menjual tanah-tanah yang telah digadaikan itu tanpa memulakan prosiding di bawah Kanun bagi mendapatkan satu penjualan kehakiman.

[3] Dalam prosiding-prosiding di bawah Kanun untuk menguatkuasakan satu gadaian berkanun ke atas tanah, ss. 254 hingga 265 menganugerahkan ke atas penggadai beberapa hak tertentu yang tidak dimiliki oleh syarikat peminjam di bawah sesuatu debentur dalam bentuk biasa. Ini termasuk (i) hak untuk disampaikan dengan Borang 16 D atau Borang 16 E sepertimana keadaannya, dan faedah-faedah yang diperolehi daripadanya (ii) hak untuk membuktikan "kausa yang sebaliknya" (iii) hak-hak yang diberikan oleh ss. 257, 258 dan 259 berhubung dengan penjualan melalui perlelongan awam (iv) hak di bawah s. 266(1) untuk menahan sesuatu jualan perlelongan dengan menawarkan jumlah yang kena dibayar sebelum lelongan dilaksanakan. Hak penggadai di bawah seksyen ini adalah penting oleh kerana, jika penggadai boleh diberi hak kepada satu pelupusan di peringkat yang sebegitu lewat, maka tidak terdapat sebab mengapa ianya tidak berhak untuk melaksanakan haknya lebih awal lagi dengan menjual tanah yang telah digadaikan itu melalui triti persendirian (v) hak untuk

didengar apabila pembeli ketika di penjualan kehakiman itu meminta untuk satu perlanjutan masa untuk membayar baki harga belian. Penafian hak yang sedemikian, perlu diambil perhatian, akan menjadikan mana-mana pendaftaran jualan batal dan tak sah, dan(vi) hak untuk mengenepikan penjualan kehakiman yang dikendalikan secara fraud, menurut pakatan sulit atau dengan cara yang tidak wajar.

[3a] Peruntukan-peruntukan ss. 254 hingga 265 Kanun adalah digubal untuk melindungi penggadai dan ianya tidak boleh diketepikan atau disingkir melalui kontrak oleh penggadai. Peruntukan-peruntukan ini, dan juga peruntukan-peruntukan yang lain dalam Bahagian XVI Kanun tersebut yang membentangkan hak dan remedi pihak-pihak di bawah satu gadaian berkanun ke atas tanah, adalah exhaustive dan exclusif, dan apa-apa percubaan untuk menyingkir melalui kontrak akan hak-hak itu, kecuali diperuntukan dengan nyatanya dalam Kanun, akan menjadi tak sah kerana bertentangan dengan kepentingan awam.

[3b] Ianya mengikut bahawa tiada kuasa penjualan boleh diberikan oleh penggadai di bawah Kanun ke atas pemegang gadaian melalui satu debentur atau surat kuasa wakil atau sebaliknya, dan bahawa prosiding mestilah dimulakan oleh pemegang gadaian untuk mendapatkan penjualan kehakiman menurut prosedur yang tegas sepertimana yang dibentangkan dalam Kanun. Akibatnya, mana-mana kuasa penjualan yang mana dikatakan akan diberikan ke atas penggadai sendiri melalui satu debentur atau surat kuasa wakil, tetapi meninggalkan kesemua sebutan berhubung dengan notis, tempoh kemungkiran atau keperluan mendapatkan satu penjualan kehakiman, akan menjadi tak sah, dan tidak berkesan bagi memberikan hak kepada pembeli untuk didaftarkan sebagai pemilik.

[3c] Mengambilkira apa yang disebut di atas, ianya semestinya mengikut bahawa kes *United Malayan Banking Corporation Bhd. v. Official Receiver and Liquidator of Soon Hup Seng Sdn. Bhd.* sejauhmana ianya memutuskan sebaliknya, adalah diputuskan secara salah.

[4] Kes-kes *Malaysia Credit Finance Bhd. v. Yap Hock Choon & Anor.* dan *Chung Khiaw Bank Ltd. v. Lau Ah Yen & Anor.* bukanlah merupakan autoriti-autoriti bagi pengataan bahawa penggadai dan pemegang gadaian boleh, melalui perjanjian, memperluaskan kuasa-kuasa pemegang gadaian di bawah Kanun bagi membolehkan pemegang gadaian menjual tanah-tanah yang digadaikan itu tanpa memulakan prosiding di bawah Kanun untuk mendapatkan penjualan kehakiman.

[5] Seksyen 206(3) Kanun tidak terpakai kepada fakta-fakta di sini. Ianya merupakan syarat duluan bagi pemakaian seksyen ini bahawa seharusnya wujud satu transaksi berhubung dengan tanah yang telah diberimilik atau kepentingan di dalamnya yang sah dan berkuatkuasa sebagai satu kontrak. Apabila, sepertimana keadaannya di sini, peruntukan-peruntukan yang relevan dalam Debentur, terhadap mana Bank telah bergantung sebagai memberikannya kuasa untuk menjual tanah-tanah, adalah tak sah, atas alasan-alasan yang dinyatakan, maka syarat duluan bagi pemakaian seksyen itu jelas tidak wujud.

[6] Ianya bukan setiap transaksi dalam tanah yang diberimilik yang telah dimasuki oleh orang-orang atau pertubuhan-pertubuhan yang dirujuk dalam s. 43 Kanun yang memberikan hak *in rem* tetapi hanya urusan-urusan yang terlingkung dalam maksud dan bidang s. 5 Kanun. Ianya mengikut, bahawa s. 108 Akta Syarikat 1965 bukanlah merupakan satu punca bebas bagi mewujudkan kepentingan dalam tanah. Penjualan melalui debentur bagi tanah yang digadaikan di bawah Kanun tidak diperuntukan dalam Statut tersebut. Seksyen 108, dengan itu, telah digubal dengan jelasnya tanpa menghiraukan perbezaan antara undang-undang gadai-janji Inggeris dan gadaian berkanun di bawah Kanun.

[7] Ianya merupakan undang-undang di United Kingdom bahawa penggulungan yang berlaku selepas perlantikan penerima dan pengurus akan menamatkan kuasa-kuasa persendiriannya tetapi tidak kuasa *in rem* nya. Perbezaan antara kuasa-kuasa *in rem* penerima dan pengurus dan kuasa-kuasa persendiriannya adalah bahawa kuasa yang terdahulu datangnya daripada jaminan yang diwujudkan oleh debentur dan berkaitan dengan aset-aset syarikat, manakala kuasa yang terkemudian pula berkaitan dengan segala hal yang lainnya.

[7a] Dengan itu, di United Kingdom, kuasa yang telah diberikan kepada penerima bagi tujuan menjamin sesuatu faedah kepada pemegang debentur adalah tak boleh batal kerana ianya seakan-akan kuasa yang telah diberikan kepada pemegang debentur sendiri. Sehubungan itu, penerima yang dilantik ke atas aset-aset yang mana termasuk hutang gadai-janji boleh secara sahnya melaksanakan kuasa jualan atas nama syarikat, meskipun ianya berada dalam penyelesaian, atas rasional bahawa ianya merupakan penjualan hartanah yang tidak menjadi milikan syarikat itu tetapi membentuk sebahagian daripada jaminan pemegang debentur dan dengan itu tidak melanggari s. 227 Akta Syarikat 1948 (bersamaan dengan s. 223 Akta Syarikat 1965).

[8] Terdapat perbezaan yang penting antara gadai-janji Common Law dan gadaian berkanun di bawah Kanun. Di bawah gadai-janji yang terdahulu berlaku pemindahan milikan tanah yang digadai-janji kepada pemegang gadai-janji, sedangkan di bawah gadaian berkanun tidak terdapat pemindahan yang sedemikian dan gadaian hanya berkuatkuasa sebagai jaminan sahaja, yang boleh dikuatkuasakan oleh prosiding Mahkamah bagi mendapatkan penjualan kehakiman.

[8a] Ianya mengikut bahawa dalam kes semasa ini, dengan wujudnya penyelesaian, mana-mana jualan oleh Penerima dan Pengurus tanah-tanah tersebut selaras dengan Debentur akan merupakan penjualan hartanah yang menjadi milikan Syarikat Peminjam, dan dengan yang demikian, memerlukan kelulusan Mahkamah di bawah s. 223 Akta Syarikat 1965. Tidak seperti keadaannya di United Kingdom, kuasa-kuasa am penerima bagi pelangsaian aset-aset dalam negeri ini tidak dapat bertahan bila berlaku penggulungan.

[9] Seseorang penerima atau pengurus bagi mana-mana bahagian akujanji perbadanan yang dilantik di bawah suatu kuasa yang terkandung dalam mana-mana suratcara adalah, menurut s. 4(1)(b) Akta Syarikat 1965, merupakan seorang pegawai perbadanan itu. Beliau adalah dengan itu terikat kepada tanggungjawab di bawah s. 300(1) Akta untuk menyerahkan kepada penyelesai yang dilantik oleh Mahkamah, antara lainnya, kesemua harta alih dan tak alih perbadanan itu yang berada di bawah jagaan atau kawalannya. Implikasinya yang jelas adalah bahawa penyelesaian itu bukan sahaja menamatkan ejensi penerima dan pengurus tersebut tetapi juga kuasa-kuasanya apabila berlaku penggulungan, oleh kerana tidak terdapat harta untuk ditadbirkan oleh penerima dan pengurus tersebut.

[Rayuan dibenarkan. Penghakiman Mahkamah di bawah diketepikan dan digantikan dengan perintah-perintah pengisytiharan yang memihak kepada syarikat peminjam.]

Cases referred to:

United Malayan Banking Corporation Bhd. v. Official Receiver and Liquidator of Soon Hup Seng Sdn. Bhd. [1986] 1 MLJ 75 ***(ovrd)***

Muniandy a/l Thamba Kaundan & Anor. v. Development & Commercial Bank Berhad & Anor. [1996] 2 CLJ 586 ***(cit)***

M & J Frozen Food Sdn. Bhd. & Anor. v. Siland Bhd. & Anor. [1994] 2 CLJ 14 ***(cit)***

Chartered Bank v. Packiri Maideen [1963] MLJ 276 ***(refd)***

Kuala Lumpur Finance Bhd. v. Yap Poh Kian (Teo Sik & Anor. Interveners) [1992] 1 MLJ 472 ***(refd)***

Gurpal Singh v. Kananayer [1976] 2 MLJ 34 ***(cit)***
Suppiah v. Ponnampalam [1963] MLJ 202 ***(cit)***
Johnson v. Moreton [1978] 3 All ER 37 ***(cit)***
SEA Housing v. Lee Poh Choo [1982] 2 MLJ 31 ***(cit)***
Ooi Boon Leong & Ors. v. Citibank NA [1984] 1 MLJ 222 ***(cit)***
British Eagle International Airlines v. Compagnie National Air France [1975] 1 WLR 758 ***(cit)***
Lee Kim Seng v. Acme Canning Sdn. Bhd. [1977] 2 MLJ 141 ***(cit)***
Haji Taib v. Ismail [1971] 2 MLJ 36 ***(cit)***
National Bank of Australasia v. United Hand in Hand and Band of Hope Co. [1879] 4 AC 391 ***(foll)***
Re Burton ex parte The Union Bank of Australia Limited [1901] 27 VLR 437 ***(foll)***
Smith v. National Trust [1912] 45 Can. SCR 618 ***(refd)***
Malaysia Credit Finance Bhd. v. Yap Hock Choon & Anor. [1989] 1 MLJ 232 ***(refd)***
Chung Khiaw Bank Ltd. v. Lau Ah Yen & Anor. [1989] 1 CLJ 1065; [1989] 2 MLJ 247 ***(refd)***
Yong Tong Hong v. Siew Soon Wah & Ors. [1971] 2 MLJ 105 ***(cit)***
Mercantile Bank Ltd. v. The Official Assignee of the Property of How Han Teh [1969] 2 MLJ 196 ***(cit)***
Inter-Continental Mining Co. Sdn. Bhd. v. Societe Des Etains De Bayas Tuduh [1974] 1 MLJ 145 ***(cit)***
Alfred Templeton v. Low Yat Holdings Sdn. Bhd. & Anor. [1993] 1 MLJ 443 ***(cit)***
Cheng Hang Guan & Ors. v. Perumahan Farlim (Penang) Sdn. Bhd. & Ors. [1993] 3 MLJ 352 ***(cit)***
Gosling v. Gaskell [1987] AC 575 ***(foll)***
American Express International Banking Corporation v. Hurley [1985] 1 All ER 564 ***(cit)***
Sowman v. David Samuel Trust Ltd. [1978] 1 All ER 616 ***(dist)***
B. Johnson & Co. (Builders) Ltd. [1955] 1 Ch. 634 ***(refd)***

Legislation referred to:

Companies Act 1948 [UK], ss. 227, 333
Companies Act 1965, ss. 4(1)(b), 108, 114, 223, 300(1)(b)(i), (ii), 305
National Land Code 1965, ss. 5, 43, 206(3), 254(1), 255(1), 257, 258, 259, 260, 266(1), (2)
Land Transfer Act 1890, ss. 84, 85, 87, 209
Powers of Attorney Ordinance 1949, s. 4, 6(1)(a)

Other sources referred to:

Torrrens System in Malaya, Dass, p. 429, paras. 2 & 3
Trietel on Contract, p. 782
A legal impossibility: Arming chargees with private power of sale of charged land outside the provisions of the National Land Code 1965, Loh & Chew, [1990] 1 MLJ xxxvi

[Appeal from High Court Malaya, Kuala Lumpur; Originating Summons No: D3-31-195-88]

For the appellant - Cecil Abraham (Rabindra S. Nathan, Paul Ong & Kenny Ng with him); M/s. Paul Ong & Assoc.
For the respondents - T. Thomas (Sitpah Selvaratnam with him); M/s. Skrine & Co.

JUDGMENT

Edgar Joseph Jr FCJ:

The appellant ('the Borrower Company') is the registered proprietor of certain lands comprised in HS(D) 11017 PTD 12680 ke HS(D) 11025 PTD 12688, HS(D) 11026 PTD 12690 ke HS(D) 11323 PTD 12987, HS(D) 11324 PTD 12989 ke HS(D) 11340 PTD 13005 in the Mukim Simpang Kanan in the District Batu Pahat, Johor ('the lands').

In September of 1980, the Borrower Company executed a first legal charge under the National Land Code 1965, ('the Code') over the lands in favour of Bank Bumiputra Bhd., the first respondent, ('the Bank') to secure banking facilities granted to the Borrower Company, bearing presentation No. 17837/80 Volume 756 Folio 29 and registered on 18 September 1980 ('the First Statutory Charge').

Similarly, in June 1985, the Borrower Company executed a second legal charge under the Code over some of the lands, namely, HS(D) 11325 PTD No. 12990 to HS(D) 11340 PTD No. 13005, in favour of the Bank to secure banking facilities granted to the Borrower Company, bearing presentation No. 6658/85 Volume 1376 Folio 82, and registered on 30 June 1985 ('the Second Statutory Charge').

The First and the Second Statutory Charges were duly registered under s. 108 of the Companies Act 1965 ('the Act').

On 29 June 1985, the Borrower Company executed a deed of debenture in favour of the Bank to secure various banking facilities ('the Debenture') whereby the Borrower Company created.

(1) a fixed charge over all its plant, equipment, machinery, motor vehicles with its accessories and parts pertaining thereto, and

(2) a first floating charge over, *inter alia*, all its undertakings, properties and assets, both moveable and immovable.

The provisions of the Debenture, so far as relevant to this appeal, were these:

(i) at any time after the moneys thereby secured shall have become repayable:

(a) the Bank or any authorised person may enter into and upon any land or premises where the properties or assets of the company thereby charged are and may take possession and control thereof (s. 8.03); and

(b) The Bank may appoint any persons to be the Receivers and Managers of the properties thereby charged to it (s. 8.03 (c)).

(ii) the Receivers and Managers appointed by the Bank shall have power, *inter alia*:

(a) to take possession of or collect and get in all the properties or assets charged under the said Debenture;

(b) to carry on, manage or concur in carrying on or managing the company's business;

(c) to sell or concur in selling any of the assets or properties of the company thereby charged at such price as they in their absolute discretion shall think fit, having regard to the views and desires of the Bank; and

(d) to do all such other reasonable acts and things as may be considered to be incidental or conducive to any of the matters or powers contained in the said debenture and which the Receivers and Managers may lawfully do as agents of the company (s. 8.04);

(iii) the Bank may at any time after the moneys thereby secured shall have become payable effect the sale of any of the properties of which it takes possession and the company shall do all things necessary to enable the Bank to complete any such sale (s. 10.07).

The Debenture was duly registered pursuant to s. 108 of the Act.

Events having occurred upon which the powers to appoint receivers and managers under the Debenture became exercisable on 13 August 1987, the Bank pursuant to such powers, duly appointed the second, third and fourth respondents as Receivers and Managers of the Borrower Company ('the Receivers and Managers').

In these circumstances, the Receivers and Managers recognising that there was no express provision in the Debenture appointing them as attorneys of the Borrower Company and being desirous of selling the lands without resorting to proceedings under the Code to obtain a judicial sale, chose to apply to the High Court by way of Originating Summons issued on 1 October 1988 "for leave to sell the lands."

On 27 February 1989, the Borrower Company went into liquidation and the application by the Receivers and Managers was opposed by the liquidator ('the Liquidator').

At the outset, we should like to point out that the prayer in the application by the Receivers and Managers "for leave to sell the lands", was not appropriate; since if they were correct in their contention that the Debenture did confer authority on them to sell the Charged Lands and to give a valid and registrable title to a purchaser, no leave would have been required. If, on the other hand, the Debenture did **not** confer upon them the requisite authority to sell the lands, no leave could be given. It was because the Receivers and Managers had entertained some doubt, about their authority under the Debenture to sell the lands, that the appropriate prayer for them to have inserted would have been for a declaration as to entitlement to sell the lands without resorting to proceedings under the Code to obtain a judicial sale, and to give valid and registrable title to the purchaser.

Having said that, we must add that this point about the form of the prayer was not taken either in the Court below or before us, and the appeal was argued on the basis of the appropriate prayers. In these circumstances, we consider that this appeal should be decided on the same basis, and so we need say nothing more about this point.

In the Court below, the learned Judge held: (1) that the Receivers and Managers were, by virtue of the powers conferred upon them by the Debenture, entitled to sell the lands which were subject to the First and Second Statutory Charges, without taking proceedings under the Code to obtain a judicial sale; (2) the fact that a company has been put into liquidation does not affect the securities held by the Receivers and Managers at least, not until the secured creditor has been fully paid off. The secured creditors could dispose of the securities despite the liquidation. His Lordship further said that the Receivers and Managers were entitled to do what the Debenture entitled them to do.

In deciding as he did the learned Judge relied heavily on the judgment of the High Court, Johor Bahru, in *United Malayan Banking Corporation Bhd. v. Official Receiver and Liquidator of Soon Hup Seng Sdn. Bhd.* [1986] 1 MLJ 75 where the facts bore a strong resemblance to the present case. In holding as it did, the High Court, Johor Bahru, after referring to the rival submissions of Counsel, said this (at p. 82 col. 1 G):

> The power to sell under the debenture arises by virtue of the contractual provisions of the debenture itself. In this case cl. 10 of the debenture is relevant. So is s. 206(3) of the Code which expressly reserves the contractual operation of any transaction relating to alienating land.

And, further down, the High Court, Johor Bahru, said this (at p. 82 col. 2 F to H):

> Here the Bank has the issue document of title and all that is required to consummate the sale is a valid registrable transfer of the property. In the circumstances of this case this objective can be easily achieved by making an order that the Bank and/or the Receiver be entitled to require the Registrar of this Court to execute on behalf of the company any transfer which the Bank and/or the Receiver may present subject to the name of the transferee and the consideration for the sale being duly stated therein. A further order can, if need be, be made directing the Registrar of Titles – to register the transfer in favour of the purchaser. In other words the same procedure would be followed as if the sale had been conducted by the Court.

And, dealing with the impact of liquidation upon the powers of the receiver and manager there, the High Court, Johor Bahru, said this (at p. 81 co. 2 para. 2:

> Mr. Paul Ong's next submission is that upon the commencement of the liquidation (i.e., the date of the presentation of the petition - see s. 219(2) of the Act), the agency of the Receiver for the company came to an end. But a clear distinction must be drawn between the termination of the agency and the survival of the powers of the debenture holder, which in my view of the law, transcend and exist independently of the liquidation.

The Liquidator being dissatisfied with the judgment of the Court below had caused to be brought the present appeal.

Broadly stated, the question for decision in the present appeal is whether the learned Judge was right in holding as he did in fact hold on **both** the points of Law hereinbefore mentioned.

Before us, the basic contention of Counsel for the Bank is that the special agreement contained in the Debenture conferred on the Bank a conventional power of sale exercisable independently of the provisions of the relevant provisions of the Code. In considering this argument, it is necessary to examine the nature and characteristics of a charge under the Code, the rights and powers incidental to such a security and lastly, whether a study of the scheme of the relevant provisions of the Code shows that the legislature was dealing **exhaustively and exclusively** with the powers of the statutory chargee to defeat the chargor's title as registered proprietor **or** more particularly, whether such a study reveals, that the legislature intended that a chargor can by the introduction of apt and sufficient words whether in an annexure to the charge under the Code or a debenture effectively confer upon his chargee a power of sale additional to and independent of the powers conferred by the relevant

provisions of the Code, and exercisable without the intervention of the Court, thus bypassing the machinery expressly provided by the Code in that behalf.

The **essential difference** between a Common Law mortgage and a statutory charge under the Code may be taken from Dass in his valuable work on the *Torrens System in Malaya* at p. 429 paras. 2 and 3 where he says this:

> In an English mortgage, where ownership is transferred until the property mortgaged is sold by the mortgagee or foreclosed and the sale becomes absolute, the equity of redemption remains with the mortgagor. *Apropos* of English mortgage Lord MacNaghten remarked, 'No one I am sure, by the light of nature, ever understood an English mortgage of real estate'. (*Samuel v. Jarrah Timber & Wood Paving Corporation Ltd.,* [1904] AC 323, 326.) 'By an indenture of mortgage the legal estate is conveyed to the mortgagee subject to the condition that the mortgagee will reconvey upon payment of principal and interest secured by the deed. Though registration is usual and desirable for the protection of the mortgagee, it is not essential to the validity of the mortgage. Equity has, however, always regarded the mortgagee as taking only such an estate as was necessary for the purpose of the security.' (Beckenham and Harris, The Real Property Act (NSW), p. 131.)
>
> Under the Torrens system there is no transfer of ownership of land by statutory mortgage. The distinction between the power of a statutory mortgagee in practically every Torrens legislation, including Singapore, (Land Titles Ordinance, s. 54 and 60; Baalman, Singapore Torrens system, pp. 133, 141) and of a statutory chargee in the Malay States is that in the latter jurisdiction "no power of sale or foreclosure is conferred on the chargee himself, but proceedings must be taken to obtain a judicial sale."

To put it another way, under the Common Law mortgage, the rights and powers of the mortgagee are those which are incidental to the legal or equitable estate vested in him in his role as mortgagee **whereas** under the statutory charge **under the Code,** the rights and powers of the chargee are not derived from such estate since none is vested in him and so his rights and powers must flow from the relevant provisions of the Code with the charge taking effect as a security only, enforceable by proceedings in Court to obtain a judicial sale.

The next matter which calls for consideration is whether the scheme of the relevant provisions of the Code shows that the legislature was dealing **exhaustively and exclusively** with the powers of a statutory chargee to defeat the chargor's title as registered proprietor. This topic requires an examination of the rights and obligations of chargor and chargee incidental to a charge under the Code.

Clearly, in the event of proceedings being brought under the Code to enforce a statutory charge over land, a chargor possesses certain valuable **rights** none of which are possessed by a borrower company under a debenture in common form. It is not proposed to set out an exhaustive list of these rights but some of the more obvious ones may be noted.

Firstly, upon breach by the chargor of any of the agreements on his part expressed or implied in the charge, continuing for at least one month or such alternative period as may be specified in the charge, notice in Form 16D is served specifying the breach and requiring the chargor to remedy the same within one month of the date of the notice, or such alternative period as may be specified in the charge, with a warning that in the event of non-compliance, proceedings to enforce the charge by obtaining a judicial sale will be commenced (s. 254(1) of the Code). Under this provision there will, generally, be a time lag of at least two months between the date of breach and the commencement of proceedings in Court to enforce the charge. In the case of charges where the principal is payable on demand, s. 255(1) of the Code provides an alternative procedure by requiring service of a notice in Form 16E, immediately upon such breach, requiring it to be remedied within one month and adding that in the event of non-compliance, proceedings to enforce the charge, by obtaining a judicial sale may be forthwith commenced without it being required to serve a notice in Form 16D under s. 254(1). Under this provision there will be a time lag of at least one month between the date of breach and the commencement of proceedings in Court to enforce the charge.

It is obvious, that the advantage of the Notice requirements under ss. 254 and 255 of the Code, is that it will entail delay thus affording the opportunity to the chargor to bustle about to raise the money to pay the demands. Non-compliance with the notice requirements will render a subsequent order for sale liable to be set aside as being void and of no effect. (See, e.g. *Muniandy a/l Thamba Kaundan & Anor. v. Development & Commercial Bank Berhad & Anor.* [1996] 2 CLJ 586; [1996] 1 MLJ 374).

Secondly, proceedings for sale directed by the Code, require judicial intervention. Thus, the chargor will be accorded a certain measure of protection, since the Judge will have to be satisfied that the requirements of the Code have been satisfied, before making an order for sale.

Thirdly, at the hearing of proceedings directed under the Code, the chargor will have the opportunity of "showing cause to the contrary" within the meaning of s. 254 of the Code, in other words, the right to be heard.

Moreover, as pointed out by Wan Yahya SCJ in *M & J Frozen Food Sdn. Bhd. & Anor. v. Siland Bhd. & Anor.* [1994] 1 MLJ 294 at 311 B "Under s. 258 and 261, the chargor is not only given the opportunity to show cause as to why his property should not be sold but also to participate in the deliberation on matters affecting his interest, such as the reserve price, the time, venue and conditions of sale".

Fourthly, by reason of s. 257 of the Code, the terms to be inserted in the order for sale must include, a sale by public auction on an ascertained date, not less than one month from the date of the order and at a reserve price fixed by the Registrar of the Court and the total sum payable under the charge at the date of the order. The conditions of sale are usually provided for in the relevant State Conditions of Sale.

Fifthly, the chargor has a right to be served with a copy of the Order for Sale, for the sale to be advertised and there is an obligation resting on the chargee to prepare the conditions of sale and to deliver to Court the issue document of title. (See, s. 258 of the Code).

Sixthly, the chargor has the advantage of the sale being effected under the direction of an officer of the Court who may seek the assistance of a licensed auctioneer. (See, s. 259 of the Code).

Seventhly, by virtue of s. 266(1) of the Code, a chargor against whom an order for sale has been made has the right, at any time before the sale has been concluded, this is to say, before the fall of the hammer, to stop the sale, by tendering the total sum due under the charge, including accrued interest and the usual expenses, to the Registrar of the Court or, as the case may be, to the Land Administrator, and thereupon, the order for sale shall cease to have effect. In such a situation, the chargor shall be entitled to a discharge of charge and return of the issue document of title.

This brings us to *Chartered Bank v. Packiri Maideen* [1963] MLJ 276, wherein Gill J (as he then was) held that once a charge action for an order for sale has been commenced, the charged land had to be sold by public auction. This decision is open to some justifiable criticism: s. 266(1) of the Code provides that a chargor against whom an order for sale has been made may at any time before the conclusion of the sale stop the sale by tendering the amounts specified in s. 266(2), and thus be entitled to a discharge of charge and return of the issue document of title. If, a chargor can, at such a **late stage,** be entitled to a discharge, as a matter of logic, and speaking generally, there appears to be no reason why at an **earlier stage** a chargor's application to sell the charged land by private treaty so as to enable him to exercise his right of discharge, should be refused simply because proceedings for an order for sale had been commenced.

Eighthly, where a purchaser at the judicial sale does not complete the contract on the due date, and seeks an extension of time to pay the balance of the purchase price, he must apply to Court for such extension in which event the chargor has a right to be heard and a denial thereof will render any registration of the sale procured thereby null and void as being *ultra vires* the powers of the Code. (See, *Siland Sdn. Bhd. Anor. v. M & J Frozen Food Sdn. Bhd. & Anor*. [1994] 1 MLJ 294 SC.

Ninthly, a chargor has a right to an order setting aside a judicial sale of land subject to a statutory charge (even though at such a sale the chargee is the vendor because the chargor abdicates his rights as the registered owner of the land in favour of the chargee) if he can establish that the sale had been conducted fraudulently, collusively, or improperly to the prejudice of the chargor. (See, *Kuala Lumpur Finance Bhd. v. Yap Poh Kian (Teo Sik & Anor., Interveners)*, [1992] 1 MLJ 472). In that case, Lim Beng Choon J held that neither the Registrar nor the auctioneer has any interest in the sale, and that being so the Registrar had no power to grant an extension of time for payment of the balance of the purchase price by the interveners/purchasers without the consent of the chargee.

It is obvious that the relevant portions of the Code, to wit, ss. 254-265, conferring the rights upon chargors aforesaid are designed for their protection. In the case of land held under Land Office title, the form of title corresponding to Land Office title or subsidiary title, the chargee makes his application for order for sale to the Land Administrator, in accordance with the procedure laid down in ss. 260 et seq. of the Code and these are also designed for the protection of the chargor. However, in considering such an application the powers of the Land Administrator are limited. (See, e.g. *Gurpal Singh v. Kananayer* [1976] 2 MLJ 34, 36). Thus, any objection as to the validity of the charge must be taken before the Courts for it is no defence in the inquiry before the Land Administrator. (See, *Suppiah v. Ponnampalam* [1963] MLJ 202, 204).

It is equally obvious that it is not every transaction in alienated land entered into by a person or bodies referred to in s. 43 of the Code which confers rights *in rem* but only such dealings as come within the meaning and ambit of s. 5 of the Code which provides:

> 'dealing' means any transaction with respect to alienated land effected under the powers conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order.

It follows that s. 108 of the Act is not an independent source for the creation of an interest in land. Sale by debenture of land charged under the Code is nowhere provided for by statute. Section 108 appears to have been enacted without regard to the difference between the English Law of mortgages and the statutory charge under the Code.

The question whether a person entitled to the performance of a statutory duty can effectively **waive** performance of the duty by the person bound and the latter can effectively **contract out** of performing the duty, depends on the language of the particular statute and, if this is not clear, on the overall purpose of the statute and whether this purpose would be defeated by permitting **waiver** and **contracting out**. *Trietel on Contract* (at p. 782) has correctly pointed out:

> Difficult questions can arise where a person attempts by contract to waive a right conferred on him by statute. Although there is a general principle that a person may waive any right conferred on him by statute *(quilibet potest renunciare juri pro se introducto)* difficulties arise in determining whether the right is exclusively personal or is designed to serve other more broad public purposes. In the latter situation, public policy would require that the right be treated as mandatory and not be waivable by the party for whose benefit it operates. Whether a statutory right is waivable depends on the overall purpose of the statute and whether this purpose would be frustrated by permitting waiver.

Turning to case law, on the subject of when **contracting out** of a statute may or may not be permitted, *Johnson v. Moreton* [1978] 3 All ER 37, *SEA Housing Corp. v. Lee Poh Choo* [1982] 2 MLJ 31; *Ooi Boon Leong & Ors. v. Citibank NA* [1984] 1 MLJ 222; *British Eagle International Airlines Ltd. v. Compagnie Nationale Air France* [1975] 1 WLR 758; *Lee Kim Seng v. Acme Canning Sdn. Bhd.* [1977] 2 MLJ 141; *Haji Taib v. Ismail* [1971] 2 MLJ 36, may be read with profit.

But, most particularly, there are at least two Australian cases, which show that a clause in a mortgage to deprive a mortgagor of his right to have a notice of demand served upon him, after he is in default, as a necessary preliminary step to a sale under the relevant Victorian legislation, would be invalid. I refer to *National Bank of Australasia v. United Hand in Hand and Band of Hope Co.* [1879] 4 AC 391 and in *Re Burton ex parte The Union Bank of Australia Limited* [1901] 27 VLR 437.

In the *National Bank of Australasia* case, the special clause in the instrument of mortgage was to the effect that, notwithstanding anything contained in the Land Transfer Act, it should be lawful for the bank, in the event of default being made in the payment of the principal money and interest secured immediately to serve notice of demand and, after the expiration of fourteen

days from the service of the notice of demand, to sell the lands in pursuance of the powers in that behalf vested in the mortgagee under the 85th section of the statute.

The 84th section provided that if the mortgagor shall make default in payment of the principal sum or interest, and such default shall be continued for one month, or for such other period of time as may therein for that purpose be expressly fixed, the mortgagee may serve on the mortgagor, in the manner therein specified, notice in writing to pay the money owing on the mortgage. The 85th section provided that if such default shall continue for one month after the service of such notice, or for such other period as may in such mortgage be for that purpose fixed, the mortgagee may sell the land.

It was argued that the demand served was the only notice of demand required to be served to support a sale made fourteen days after this service in pursuance of the statutory power. Their Lordships did not agree with this contention. They held that a demand within the meaning of the statute was necessary in order to fix the time of payment and until its service there could be no default. Their Lordships observed that the special clause in the instrument of mortgage qualified the 84th section by allowing notice of demand to be served immediately instead of "one month" after default, and the 85th section by allowing the sale to be made fourteen days instead of one month after service of such notice was ineffective to deprive the mortgagor of the right to have a notice of demand served upon him, after he is in default, as a necessary preliminary step to a sale under the statutory power. Their Lordships concluded this part of the case by saying that in the circumstances outlined, upon an application to complete the title of the purchaser by registration under the 87th section of the Act an objection on the ground of failure to serve a proper notice of demand would probably have been taken by the Registrar.

In *re Burton*, an instrument of mortgage registered under the provisions of the Transfer of Land Act 1890 contained a covenant for payment on demand in writing given to or sent through the post in a prepaid letter addressed to the mortgagor, his heirs, executors, administrators or transferees. Subsequently, a transfer of the mortgage was registered. Default in payment occurred, and notice of sale under s. 114 of the Act was served on the mortgagor by registered letter, but no demand for payment and no notice under the section were served upon the transferee.

In refusing the application for foreclosure, the Commissioner of Titles said, *inter alia*, this:

> Section 115 of the Act deals with mortgages which make the moneys secured payable on demand, and as ss. 84 and 85 of the Transfer of Land Statute 1866, No. 301 (corresponding to ss. 114 and 115 of the Transfer of Land Act 1890) required default, demand, sale, and the mortgage required default, demand, sale, s. 44 of Act 872 (now by consolidation s. 115 of the Transfer of Land Act 1890) was passed to make the one notice and the one default sufficient, and accomplished this by making the demand 'pursuant to' the mortgage equivalent to the notice required by s. 114, but s. 115 does not operate to vary the mode or service of notice prescribed by s. 114 or to put it in the power of parties dealing with lands under the Act to contract themselves out of the Act and evade one of the principal requirements and safeguards, namely, that the registered proprietor of the land shall have notice of any proposed dealing with the land prejudicial to his title. In this case if the mortgage conferred on the mortgagee the option of giving notice to the mortgagor without also giving notice to the transferee the registered proprietor would if a sale had been effected on 5 February 1901 have been denuded of his title without his knowledge and without any opportunity of exercising his equity of redemption. That fact that the attempted sale proved abortive, and that notice of the mortgagee's intention to apply for a foreclosure order was sent as alleged to the transferee, does not cure the want of the 'default' ...

On a summons under s. 209 of the Land Transfer Act 1890 calling upon the Registrar of Titles to show why an order of foreclosure should not be issued by him, Williams J referred the same to the Full Court which held that for the reasons stated in the course of the argument that the Commissioner was right, and that the summons should be dismissed. In the course of the argument Holroyd J said, *inter alia,* this: "The Act controls the instrument of mortgage. You cannot draw up a mortgage so as to control the Act. The strictest procedure is intended to be followed in regard to foreclosure."

There is also a decision of the Supreme Court of Canada in *Smith v. National Trust* [1912] 45 Can. SCR 618 applying the principle of construction which, excludes the validity of any power of sale not authorised by the statutes and ensuring that "the benefit of the Act" shall be "dependent upon its requirements being satisfied", with the result that a power of sale omitting all mention of notice and periods of default, and carried out without reference to any judicial directions, is invalid for the purpose of enabling the purchaser from the mortgagee to be registered as owner.

In our view, therefore, the provisions of the Code as to the rights of chargors are designed for their protection and cannot be waived nor can the chargor contract himself out of the Code. It follows, that no power of sale can be conferred by a chargor under the Code on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the rigid procedure

laid down in the Code. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default, by a debenture or power of attorney and the necessity for obtaining a judicial sale, would be invalid and ineffective to entitle a purchaser to be registered as owner. With respect, we must therefore hold that the case of *UMBC v. Official Receiver and Liquidator of Soon Hup Seng Sdn. Bhd. (supra)*, in so far as it decides to the contrary, was wrongly decided.

We hasten to add, that we have not overlooked the cases of *Malaysia Credit Finance Bhd. v. Yap Hock Choon & Anor.* [1989] 1 MLJ 232 (High Court - KL); *Chung Khiaw Bank Ltd. v. Lau Ah Yen & Anor.* [1989] 2 MLJ 247 (High Court - Penang) which, according to Counsel for the Bank were authorities for the proposition that a chargor and chargee could by agreement enlarge the powers of a chargee under the Code and thus enable a chargee to sell the charged land without taking proceedings under the Code to obtain a judicial sale.

In our view, neither the *Malaysia Credit Finance* case nor the *Chung Khiaw Bank* case, is authority for the proposition for which they were cited. Moreover, with profound respect, both these cases have been subjected to some justifiable criticism. (See, Loh and Chew: *"A legal impossibility: Arming chargees with private power of sale of charged land outside the provisions of the National Land Code 1965"*, [1990] 1 MLJ xxxvi).

Counsel for the Bank also relied on s. 206(3) of the Code which provides:

> 206(3) Nothing in sub-s. (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein.
>
> Sub-section (1) provides:
>
> (1) Subject to the following provisions of this section -
>
> (a) every dealing under this Act shall be effected by an instrument complying with the requirements of ss. 207 to 212; and
>
> (b) no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Part Eighteen.

In our view, s. 206(3) of the Code, contains an express provision which states that the provisions of the Code requiring a dealing to be effected in the statutorily prescribed manner "shall not affect the contractual operation of **any transaction** relating to alienated land or any interest therein." This provides statutory authority for the liberal application of equity whenever there is a basis

for that. (See, e.g. *Yong Tong Hong v. Siew Soon Wah & Ors.* [1971] 2 MLJ 105; *Mercantile Bank Ltd. v. The Official Assignee of the Property of How Han Teh [1969] 2 MLJ 196; Inter-Continental Mining Co. Sdn. Bhd. v. Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145; *Alfred Templeton & Ors. v. Low Yat Holdings Sdn. Bhd. & Anor.* [1993] 1 MLJ 443, at 459; *Cheng Hang Guan & Ors. v. Perumahan Farlim (Penang) Sdn. Bhd. & Ors.* [1993] 3 MLJ 352, 405).

However, it is a condition precedent for the application of s. 206(3) that there is in existence a transaction relating to alienated land or an interest therein which is valid and enforceable as a contract. When, therefore, as here, the relevant provisions of the Debenture relied upon by the Bank as conferring upon it a power to sell the lands are void, for the reasons stated, the condition precedent for the application of s. 206(3) is absent.

In our view, the provisions of the Code setting out the rights and remedies of parties under a statutory charge over land comprised in Part XVI **are exhaustive and exclusive** and any attempt at contracting out of those rights, unless expressly provided for in the Code, would be void as being contrary to public policy.

We are supported in this by the following passages in Das on *"The Torrens System in Malaya"* at pp. 429-430:

> The specific provisions of the Code, where applicable, override the covenants between the parties. The method prescribed for sale is intended to be exclusive. The form of charge is purely statutory. It no doubt permits the insertion of special covenants and powers limiting or enlarging the rights of the parties but not so as to authorise the chargee to deal with the title in a manner which is repugnant to the express provisions of the Code.

We would, therefore, answer the first question of law posed above: whether the Receivers and Managers were by virtue of the powers conferred upon them by the Debenture entitled to sell the charged lands without taking proceedings under the Code, to obtain a judicial sale? in the negative, that is to say in favour of the Borrower Company.

On a further ground also, the Borrower Company is entitled to succeed.

The second question of Law: What is the impact of the winding up of the Borrower Company on the receivership; in particular, on the powers of sale of the Receivers and Managers?, had been argued before the learned Judge and determined by him and since it had also been raised before us, and indeed, fully argued, we think it would be desirable if we said something about it as well.

It was contended by Counsel for the Borrower Company, by way of alternative, that although the Receivers and Managers were agents of the Borrower Company at the time of their appointment, upon the Borrower Company being placed in liquidation on 27 February 1989, their agency and powers to carry on the Borrower Company's business ceased (*Gosling v. Gaskell* [1987] AC 575 HL) and that consequently they had no authority to sell the charged lands.

It is undoubtedly the Law in the United Kingdom that with the advent of liquidation a receiver and manager's status as agent of the company comes to an end and he then becomes a principal in his own right unless he looks to and receives instructions from the debenture holder regarding the conduct of the receivership. (See, e.g. *American Express International Banking Corporation v. Hurley* [1985] 3 All ER 564). To put it another way, winding up after a receiver and manager is appointed terminates his purely **personal** powers but not his *in rem* powers.

The distinction between a receiver's and manager's *in rem* powers and his **personal** powers is this: the former flow from the security created by the debenture and relate to the assets of the company **whereas** the latter relate to everything else. So, for example, in *Sowman v. David Samuel Trust Ltd.* [1978] 1 All ER 616, a receiver appointed over assets which included a mortgage debt could validly exercise the power of sale in the name of the company despite its liquidation. This power being coupled with an interest, was irrevocable both at common law and by statute; and accordingly, a power given to the receiver for the purpose of securing a benefit to the debenture holders was irrevocable as a power given to the debenture holders themselves. It was further held that the sale did not contravene s. 227 of the Companies Act 1948, (equivalent to Malaysia: s. 223) since although made in the name of the company, it was a sale of property which did **not** belong to the company but formed part of the debenture holder's security.

I note that the High Court, Johor Bahru, in *United Malaysian Banking Corporation Bhd. v. Official Receiver, (supra)* followed *Sowman* when it held that liquidation of the company had no consequence to the validity of the power of the receiver to sell the charged land and execute the transfer without the intervention of the Court. In so holding the High Court, Johor Bahru, drew a sharp distinction between the termination of the receiver's agency of the company and the survival of the receiver's powers under the debenture which in its view transcended and existed independently of the liquidation (*ibid.* at p. 81). The High Court, Johor Bahru, also laid stress on the point that the power to sell under the debenture arises by virtue of the contractual provisions of the debenture itself and so it was necessary to distinguish between the power to sell and the mechanics of giving good title. The High Court, Johor

Bahru, also pointed out that had the debenture been deposited under s. 4 of the Powers of Attorney Ordinance 1949, then s. 6(1)(a) of the Ordinance would have rendered the liquidation of no consequence to the validity of the power of the receiver to make good title to the company's property in the company's name and thus the receiver could sell the land.

The question for decision regarding this part of the case is whether in Malaysia, s. 223 of the Act, prohibits the Receivers and Managers from making a valid disposition of the lands after the commencement of the winding-up?

In the present appeal, the Judge in the Court below answered this question in favour of the Receivers and Managers, being of the view that the fact that a company has gone into liquidation does not affect a secured creditor and does not affect the securities held by them, at least, not until the secured creditor has been fully paid off. The Receivers and Managers, the Judge said, were entitled to do what the Debenture entitled them to do. The principle underlying this conclusion is that notwithstanding the liquidation which terminates the receiver's agency for the company, the receiver continues in office, has control of all or substantially all of the assets of the company, and may exercise security rights for the benefit of his debenture holder by, for example, selling and conveying the company's property. (See, *Sowman v. David Samuel Trust Ltd. (ibid)*. This – so the argument runs – is merely carrying into effect a disposition made by the company when it created the charge before it went into liquidation; it was a sale of property which did **not** belong to the company but formed part of the debenture holder's security and therefore does not require approval of the Court under s. 223 of the Act. (See, *United Malayan Banking Corporation Bhd. v. Official Receiver and Liquidator of Soon Hup Seng (ibid)* applying *Sowman v. David Samuel Trust Ltd. (ibid)*).

However, as we have said, there is an essential difference between a Common Law mortgage and a statutory charge under the Code, and the point we should like to emphasise regarding this part of the case is that under the former there is a transfer of ownership of the mortgaged land to the mortgagee **whereas** under the latter there is none, with the charge taking effect as a security only, enforceable by proceedings in Court to obtain a judicial sale. It follows that in the present case, with the advent of liquidation, any sale by the receivers and managers of the lands pursuant to the Debenture would be a purported sale of **property which belonged to the Borrower Company**, and so **would** require the approval of the Court under s. 223 of the Companies Act 1965. *Sowman's* case is therefore distinguishable because there it was a sale of property which did **not** belong to the company but formed part of the debenture holder's security. This is a point which was overlooked both by the Judge in the Court below, and also by the High Court, Johor Bahru, which decided *United Malayan Banking Corporation Bhd. v. Official Receiver.*

That, however, does not conclude the matter.

In the United Kingdom, because a receiver has all or substantially all the assets of the company under his control by reason of the security created by the debenture and retains the power to manage and to realise those assets, a liquidator is obliged to stand on the sidelines in the course of the receivership.

In *Sowman v. David Samuel Trust Ltd. (ibid),* the Land Office had refused to register conveyances of property executed by the receiver alone after the company had gone into liquidation. Gouldring J held that a power of attorney conferring upon receivers power to do various acts and, in particular, to execute conveyances in the name of the company survived the winding up. His Lordship went further and indicated (at p. 31) that the power of attorney ploy may be otiose because the receiver's general powers of realisation also survive the winding up, even though he loses his right to act as the company's agent in such a situation. In other words, his powers of realisation exist independently of his authority to bind the company as its agent.

The position in this country is different. Because a receiver and manager of any part of the undertakings of the corporation appointed under a power contained in any instrument is by definition (see s. 4(1)(b) of the Act) an officer of the corporation and all officers of a corporation whether past or present, are obliged under pain of prosecution under s. 300(1) of the Act, to deliver up to the liquidator appointed by the Court or as he directs (i) all the moveable and immovable property of the corporation in his custody or under his control or (ii) all books and papers in his custody or control belonging to the corporation, being by law required to deliver up the same (see s. 300(1)(b)(i) and (ii)), the clear implication is that liquidation does not merely terminate the agency of a receiver and manager but also his powers on winding up, **since there is no estate for the receiver and manager to administer.** With respect, therefore, *UMBC v. Official Receiver and Liquidator of Soon Hup Seng Sdn. Bhd. (ibid)* which relies on *Sowman*, must be taken to have been wrongly decided on this point as well.

There is another matter regarding this part of the case to which we should like to direct attention.

The only persons who may be made respondents in misfeasance proceedings under s. 305 of the Act are promoters, liquidators and officers. By s. 4(1)(b), "officer" is defined to include "a receiver and manager of any part of the undertakings of the corporation appointed under a power contained in any instrument", that is to say a privately appointed receiver and manager, but does **not** include, *inter alia* (i) any receiver who is not also a manager; (ii) any

receiver or manager appointed by the Court or creditors. Orders may thus be made under s. 305, against a privately appointed receiver and manager.

This brings us to the case of in *re B. Johnson & Co. (Builders) Ltd.* [1955] 1 Ch. 634, wherein it was decided that receivers and managers appointed by debenture or loan security holders were **not** within the categories of persons who could be made respondents in misfeasance proceedings under s. 333 of the UK Companies Act 1948. The reasoning of the Court of Appeal for this conclusion may be conveniently taken from the judgment of Parker LJ (at pp. 663 and 664) where he says this:

> Turning to the wording of the section itself, if a receiver and manager is included, it can only be because he comes within the words 'any officer of the company' or the word 'manager.' So far as the expression 'officer' is concerned, this is defined by s. 455 of the Act as including 'a director, manager or secretary.' No doubt a person who, in fact, manages is 'manager' within that definition, provided, and provided always, that he does so by virtue of some office which he holds in the company. But any work of management done by a receiver, though done as agent, is not done by virtue of any office that he holds in the company; and this is so whether he is appointed by the Court or out of Court. Moreover, the contrary was but faintly argued. Indeed; the main argument, raised by Mr. Blackledge was based on an acceptance of the view that a receiver and manager is not within the definition of 'officer'. Granted that he is not (so runs the argument), yet 'manager' in s. 333 itself must be used in a different and wider sense than where it appears in the definition, namely, as meaning someone who manages in the widest sense, even though not an officer. Looked at in this way, the word is wide enough, so it is said, to embrace a receiver and manager.
>
> However plausible this argument may be at first sight, it must, I think, fail when the history of the section is considered. Thus, the wording of s. 333 is to be found in very similar form persisting in successive Acts since 1862; whereas the definition of "officer" appears for the first time in the Act of 1948. Further, the argument for a distinction between the meaning of "manager" in the section and in the definition goes when it is realized that "director" also appears in both places. What, however, in my judgment, is decisive of the case is that any work of management done by a receiver is not done as manager of the company. The powers of management are ancillary to his position as receiver, and, in exercising those powers, he is not acting as manager of the company but as manager of the whole or part of the property of the company. This distinction is, as it were, underlined by the Act itself. (See the group of sections in Part VI of the Act, where the expression "receiver or manager of the property of the company" is used throughout). In my judgment, it is clear that a person occupying the position of Mr. Aizlewood in the present case is not a "manager" or "officer" within the section.

It is clear that the basis of the point decided in *re B. Johnson & Co.*, namely, that privately appointed receivers and managers are not within the reach of misfeasance proceedings was because they were **not** within the categories of persons named in the relevant statutory provision, the material part of which is different from the corresponding provision in our Act.

In the result, we would allow the appeal with costs both here and in the Court below, set aside the judgment of the Court below and substitute, in lieu thereof, declaratory orders answering both the questions of law aforesaid in favour of the Borrower Company. The deposit paid into Court must be refunded to the Borrower Company.

Reported by WA Sharif